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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 KOOKMIN BANK CO., LTD,

4 Plaintiff,

5 v.

22 Cv. 5802 (GHW)

6 BEN ASHKENAZY,

7 Defendant.

Remote Conference

8 -----x

9 September 8, 2022
2:00 p.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13 APPEARANCES

14 MORRISON COHEN, LLP
15 Attorneys for Plaintiff
16 BY: Y. DAVID SCHARF
AMBER R. WILL

17 KASOWITZ BENSON TORRES LLP
Attorneys for Defendant
18 BY: DAVID E. ROSS
19 DAVID J. MARK
DANIEL J. KOEVARY
20 ANDREW W. BRELAND

M988KOOOC

(The Court and parties appearing via teleconference)

(Case called)

THE COURT: Let me turn to taking appearances from the parties.

At the outset, I am going to ask the principal spokesperson for each set of parties to introduce themselves individually as well as the members of their team rather than having each lawyer introduce him or herself.

So I will begin with counsel for plaintiff. Who is on the line for plaintiff?

MS. WILL: This is Amber Will and Y. David Scharf from Morrison Cohen for plaintiffs.

THE COURT: Who is on the line on behalf of defendant?

MR. ROSS: Good afternoon. David Ross from Kasowitz Benson Torres. Also representing defendants are David Mark, Daniel Koevary, and Andrew Breland.

THE COURT: Let me begin by providing a few instructions about the rules that I would like the parties to follow during this conference.

At the outset, this is a conference that is a public proceeding. Any member of the public or press is welcome to audit this conference. I am not presently monitoring whether third parties are auditing the conference. So I just ask you to keep that possibility in mind.

Second, please state your name each time that you

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1 speak. You should do that even if you have spoken previously.

2 Third, please keep your lines on mute at all times,
3 except when you're speaking to me or to another party. Please
4 do that even if you don't think that there is background noise
5 wherever you may be. We all just heard somebody's e-mail sound
6 an alert. That kind of background noise will go away if
7 everybody puts their phones on mute. So please do that, except
8 when you're intentionally communicating with a participant in
9 the conference.

10 Fourth, I am instructing that the parties abide by
11 requests by our court reporter that are designed to help her do
12 her job. She may ask you to pick up the handset or speak more
13 slowly. Please try to abide by such request.

14 Finally, I am ordering that there be no recording or
15 rebroadcast of all or any portion of today's proceeding.

16 So, with that established, let's turn to the substance
17 of today's conference. I scheduled this as a premotion
18 conference with respect to a proposed motion to dismiss on
19 behalf of Mr. Ashkenazy, defendant in this case. I have read
20 both parties' letters. I am happy to hear from each of you
21 about the issues that you expect to present to the Court in
22 connection with the motion.

23 I will begin with counsel for defendant.

24 Counsel, what would you like to tell me about your
25 anticipated motion?

M988KOOO

1 MR. ROSS: David Ross, your Honor.

2 Thank you very much and good afternoon.

3 Our position is fully set forth in the August 29, 2022
4 letter that we filed with your Honor as document 13 in the
5 docket.

6 In sum and substance, the complaint is subject to
7 dismissal on probably five to eight separate grounds, but I
8 will cover the principal ones, and then I am happy to address
9 any issues your Honor may have.

10 First, the complaint doesn't state a claim for relief
11 as to the springing recourse claim, which is one of the two
12 claims in the case, because none of the alleged actions by Mr.
13 Ashkenazy constituted a consent or acquiescence in the
14 appointment of a, quote, custodian, close quote, for Union
15 Station. And, as we set forth in our premotion letter, the
16 term "custodian" refers to a third party who is appointed to
17 have control over Union Station for the purpose of protecting
18 the rights of creditors. And we believe that under the express
19 words that have been used in the springing guaranty, that no
20 custodian within the meaning of the guaranty provision has been
21 appointed or was acquiesced in or consented to by our client.

22 So, on the most fundamental basis, the basic term of
23 the springing guaranty hasn't been satisfied and, as a matter
24 of law, they could not win on that provision.

25 THE COURT: Thank you. Let me pause you on that,

M988KOOOC

1 counsel. You have seen the letter from plaintiff. They say
2 that custodian is broader than you argue, notwithstanding the
3 language that surrounds or succeeds the claim there in clause
4 4. How do you respond?

5 MR. ROSS: Your Honor, there is, I don't think, any
6 reasonable basis to accept that proposition that a party such
7 as Jones Lang Lasalle, that had been providing back office
8 services, was a custodian within the meaning of the springing
9 guaranty provision under any hypothesis. It simply had nothing
10 whatever to do with debtor-creditor-related issues with respect
11 to there being a custodian, receiver, trustee, or examiner,
12 which are a series of terms of art that are used in the
13 agreement in a particular way and are associated either with
14 bankruptcy procedure or proceedings for the benefit of
15 creditors. Nothing associated with Jones Lang Lasalle's
16 performance of back office services had anything to do with the
17 custodian within the meaning of that provision, in our view.

18 THE COURT: Thank you.

19 You have seen the argument in the letter that the
20 dictionary definition, they argue, is broader. What is the
21 textual basis for me to read the language in the more limited
22 meaning?

23 MR. ROSS: The textual basis is the plain meaning of
24 the words that are used, as they were used, number one. Number
25 two, a classic canon of construction relates to interpreting a

M988KOOOC

1 term based upon the terms that are used around it in a phrase,
2 such as it's used here. So it needs to be understood in the
3 context in which it is being used.

4 So, classic canons of construction, your Honor, I
5 think defeat their effort to try to inject a dictionary
6 definition and pull into this the idea that a party that had
7 something to do with the operations of Union Station is a
8 custodian within the meaning of this provision.

9 THE COURT: Thank you.

10 Just another brief question. I of course know
11 something about the role of JLL as a result of the proceedings
12 that we had in the related case where facts were presented to
13 me about the nature of that entity's involvement in the
14 operation of the business. Here, I will be looking to the
15 facts pleaded in the complaint in order to analyze any
16 potential motion to dismiss. Can I ask you to just comment on
17 that question? In other words, is there a sufficient basis in
18 the complaint as opposed to things that are not in the
19 complaint, integral to it, or incorporate in it that may be
20 pertinent to the motion that you expect to bring?

21 MR. ROSS: Your Honor, I think that within the four
22 corners of the complaint, number one, there is sufficient
23 factual information regarding JLL for you to be able to
24 determine whether it is in the nature of a bankruptcy
25 custodian, or custodian appointed for the benefit of creditors,

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1 as opposed to somebody that performs office services at Union
2 Station. Also, I think your Honor may be able to take judicial
3 notice based upon other filings for purposes of evaluating the
4 issue.

5 THE COURT: Thank you. I will ask you to examine that
6 question, namely, whether I can look at the substance of things
7 that are filed for the truth of the matter asserted as opposed
8 to the fact of the filings. You will examine that before
9 making an argument that I can take judicial notice of facts
10 asserted in pleadings.

11 Thank you very much.

12 What is the next basis for the proposed motion or is
13 there anything else that you would like to talk about with
14 respect to the custodian issue?

15 MR. ROSS: Yes, your Honor.

16 Second, our motion would be premised upon the
17 allegation in the complaint that the foreclosure essentially
18 resulted in a complete satisfaction of the loan at issue, the
19 mezzanine loan at issue. And, based upon both the facts in the
20 complaint and, again, the facts available to the Court in
21 public filings by the plaintiff, there is no dispute that the
22 entire amount of the debt was represented to be a particular
23 number at the foreclosure sale, and according to plaintiff's
24 allegation, the sale was effected at that number. So a full
25 satisfaction occurred, and accordingly, there is no obligation

M988KOOO

1 remaining under a springing guaranty in support of the
2 mezzanine obligation or recourse guaranty.

3 THE COURT: Let me pause you on that. You have seen
4 the plaintiff's letter. They argue, among other things, that
5 the motion is premature on this point because the issue is
6 being disputed in the related case. Is it disputed?

7 MR. ROSS: Your Honor, I think that's not the right
8 question, if I may say so. I am not ducking your question, but
9 like every motion to dismiss, we assume the facts are true as
10 pled by the plaintiff and evaluate the pleading on that basis.
11 I know they argue that there is some inconsistency, but we are
12 taking the pleading as they filed it. They have asserted that
13 they effected the foreclosure at a particular price, and as a
14 result, we are saying that there is no claim on that basis
15 under the mezzanine loan guaranties, if that is true.

16 THE COURT: Thank you. Understood. I just ask in
17 part because if there isn't a dispute about that, it may be
18 that the parties can work separate and apart from this motion
19 to resolve some of the issues presented in these cases.

20 Go on, counsel. What is the other basis for the
21 motion?

22 MR. ROSS: With respect to the recourse liability
23 claims that are asserted in connection with the mortgage loan,
24 they also fail as a matter of law because there is no
25 allegation that the mortgage lender sought to enforce the

M988KOOOC

1 mortgage loan, and as a result, it couldn't have been damaged
2 by any of the alleged conduct that's alleged in the complaint.

3 And, also, the foreclosure took place, and as a
4 result, the collateral, your Honor, was transferred. As a
5 result of the condemnation action, there was a transfer of the
6 ownership interest with respect to the collateral, and
7 accordingly, there was no interest that the mortgage lender had
8 that could be damaged following the condemnation.

9 So, again, we think as a matter of law the claims
10 under the mortgage loan guaranty also fail as a fundamental
11 matter.

12 THE COURT: Can I ask you to just repeat that
13 argument. I apologize. Would you mind just restating the
14 grounds?

15 MR. ROSS: Sure. Your Honor, the recourse liability
16 claims that were asserted in connection with the mortgage loan
17 fail as a matter of law because there is no allegation that the
18 mortgage lender sought to enforce the mortgage loan, and it
19 couldn't have been damaged as a result of the claimed
20 wrongdoing by Ashkenazy in the complaint.

21 Separate and apart from that, there couldn't have been
22 any damage because of the condemnation itself. And, as a
23 result of the condemnation, the mortgage lender no longer had
24 any interest in Union Station and couldn't have been damaged by
25 the claimed conduct.

M988KOOOC

1 THE COURT: Thank you.

2 You have seen in the opposing letter the argument, in
3 essence, that there are obligations in addition to the payment
4 obligations under the mortgage loan agreement. How do you
5 respond to that portion of the plaintiff's response?

6 MR. ROSS: Your Honor, I don't think that there are
7 any allegations in the complaint that give rise to causes of
8 action where the mortgage lender hasn't sought to enforce the
9 mortgage and has no further interest in the mortgage. So, in
10 sum and substance, I think that's the shortest way to get at
11 it.

12 THE COURT: Thank you.

13 I may come back to you on this. Anything else about
14 the grounds for the proposed motion that you would like to
15 share before I turn to counsel for plaintiff?

16 MR. ROSS: Your Honor, on the third page of our August
17 29 letter, we detailed a number of additional grounds that
18 independently require dismissal of these claims. And just
19 briefly, a few of them are: A failure to allege that the
20 lender relied on any of our alleged statements by the defendant
21 or his representatives. Also, the statements complained of, in
22 large measure, are privileged statements that occurred during
23 legal proceedings and setting forth positions, and we don't
24 think those could give rise to actionable claims. We also
25 don't think that the statements that are identified constitute

M988KOOOC

1 negligence or similar misconduct within the meaning of the
2 terms that are used in the recourse provisions.

3 So, there are a handful of others, but those are
4 principally the grounds on which we believe the entire
5 complaint is subject to dismissal on one basis or another.

6 THE COURT: Thank you.

7 Which are the privileged statements? Would you mind
8 taking a moment just to point me to them in the complaint?

9 MR. ROSS: Your Honor, hold on one second. Let me see
10 if I can find the paragraphs.

11 If one of my colleagues can chime in and help on that
12 basis, I would appreciate it. I am just thumbing through, your
13 Honor.

14 Your Honor, I am not finding it immediately. So we
15 will come back to it. But clearly there are allegations about
16 statements that have been made in court filings in the
17 condemnation proceeding.

18 THE COURT: Thank you. Good. Understood. Thank you
19 very much. I will either come back or I am happy to just wait
20 until I see this in the briefing.

21 Let me turn to counsel for plaintiff.

22 Counsel, you have heard the grounds for the proposed
23 motion just articulated by counsel. I have seen your letter.
24 This is not oral argument with respect to the motion. Still,
25 if there is anything that you would like to tell me about the

M988KOOOC

1 anticipated argument that you are going to present in
2 opposition to these positions, I am going to give you the
3 opportunity to do so now.

4 Counsel.

5 MS. WILL: Thank you. This is Amber Will for
6 plaintiff.

7 We would refer back to the letter that was filed on
8 September 6 that your Honor referenced, document number 15. We
9 believe that all of our arguments in opposition address
10 defendant's claims that the complaint should be dismissed on
11 all of the counts, and that we have adequately pled both a
12 springing recourse event as well as recourse liabilities under
13 both guaranties in this action.

14 To prevent myself from just repeating kind of all of
15 the discussion that has already been previously stated, I am
16 happy to answer any questions that the Court may have or just
17 kind of do a quick summary of our argument.

18 THE COURT: Thank you. I welcome a summary of your
19 arguments.

20 Let's start with the first issue, which is the
21 springing recourse event. Why should I read custodian in the
22 sort of generic way that you advocate for, particularly in
23 light of the language that succeeds the term "custodian" in
24 clause 4, and, frankly, all of the clauses in 1 through 5,
25 which appear generally to relate to insolvency-related defense,

M988KOOOC

1 and, arguably, 6, which is about its special-purpose nature.

2 MS. WILL: Of course.

3 So, we agree with defendant on the fact that many of
4 the clauses in the springing recourse provision refer to the
5 bankruptcy code or bankruptcy law. In clauses 1 through 3 and
6 5 through 6, there are specific references to U.S. Bankruptcy
7 Code or the bankruptcy law when that kind of limitation is
8 supposed to be applied. In clause 4, which this claim is
9 based, there is not that same limitation. There is the use of
10 the word custodian, receiver, trustee, or examiner, but it is
11 not limited in the bankruptcy context. If the parties wanted
12 to limit the provision in clause 4 to the bankruptcy context,
13 they simply could have done so. They did so in clauses 1
14 through 3. They did so in clauses 5 through 6. And so, based
15 on contractual construction, plaintiff submits that clause 4
16 was meant to be read differently, in that the limitation of
17 custodian in the bankruptcy context should not apply.

18 And by that reasoning, we can look to a broader term
19 for custodian, in which courts have looked to the Black's Law
20 Dictionary, looked to Miriam Webster, Oxford English
21 Dictionary, to see what custodian really entails. And under
22 the facts of this case, JLL, as the property manager for Union
23 Station, falls within that definition of custodian.

24 THE COURT: You're arguing that the springing recourse
25 event was intended to be triggered whenever the borrower hired

M988KOOOC

1 somebody who was a custodian, in other words, somebody who
2 cleans up? Is that the way I should interpret that provision?
3 Because a custodian is a person with that kind of a job, that's
4 the type of event that should trigger a springing recourse
5 event?

6 MS. WILL: Is your Honor referring to a custodian in
7 terms of a janitorial custodian for cleaning up purposes or
8 more broadly?

9 THE COURT: Yes. A janitorial custodian.

10 MS. WILL: No, your Honor. We wouldn't say that the
11 limitation for custodian is specific to that kind of
12 profession. We are looking at definitions in which a person or
13 institution has charge or custodian of a property, or a
14 custodian that is often in charge of a building when a landlord
15 is absent, those kind of things. It's greater than just a
16 janitorial custodian that would be sweeping the floors or
17 cleaning up Union Station. But that is not what JLL was doing
18 at Union Station. JLL is the property manager of the station
19 and had a much greater role in managing the property.

20 Also, looking at clause number 4, it's not just when
21 the borrower or Ashkenazy hired a custodian; it was when they
22 consented to or acquiesced to the appointment of a custodian
23 that was against lender's direction. And the way that this
24 comes to play, the springing recourse event, lender had
25 terminated JLL under its rights under the loan documents, and

M988KOOOC

1 then Ashkenazy had consented to Amtrak's request to keep JLL in
2 place, and that difference, going against lender's request, is
3 what triggered that springing recourse event.

4 THE COURT: So, if the term "custodian" could mean a
5 janitor, but you argue it should not be read to have that
6 meaning, what is the basis for me to conclude that it means
7 someone who has charge or custody of the property and not to
8 mean custodian in the sense of a janitorial custodian?

9 MS. WILL: Your Honor, we would just look to the plain
10 meaning of the definition. And looking to Black's Law
11 Dictionary specifically, it defines custodian as a person or
12 institution that has charge or custody of a property. And so
13 we would apply that meaning. But Miriam Webster's definition
14 and Oxford's English Dictionary's definition also kind of all
15 fall within that same reasoning, that the Court can find that
16 JLL served as a custodian in this manner.

17 THE COURT: Thank you very much.

18 Please proceed.

19 MS. WILL: Thank you, your Honor.

20 In reference to Ashkenazy's argument that the payment
21 of the mezzanine loan in full pursuant to the foreclosure sale
22 precludes the recourse liability in this case, we think, as
23 stated in the letter, that it is premature to dismiss the claim
24 on that ground given that Ashkenazy continues to challenge the
25 validity of the foreclosure action in the related proceeding

M988KOOOC

1 before this Court.

2 Regardless, the foreclosure sale did not cover the
3 other costs or expenses that are related to Ashkenazy's
4 misrepresentations, willfulness conduct and obstruction, which
5 Ashkenazy remains liable for under the recourse liabilities.

6 THE COURT: Understood.

7 Let me ask counsel about the argument presented by
8 counsel for defendant, namely, the argument that for purposes
9 of evaluating the proposed motion to dismiss, I should accept
10 the facts as pleaded as true regardless of what I know to be a
11 contested issue from the other case. In other words, that I
12 should accept the fact that the underlying loan was discharged
13 as a fact because it's pleaded, or, as I understand, he asserts
14 it's pleaded in the complaint. How do you respond to that
15 argument?

16 MS. WILL: Yes. We would argue that the Court can
17 take judicial notice of Ashkenazy's challenge in the other
18 related action to the validity of the foreclosure sale.
19 Otherwise, if the Court wishes that we amend the complaint, we
20 can always amend the complaint to specify that the validity of
21 the foreclosure is still being challenged by Ashkenazy, which
22 is why the springing recourse event is alleged here.

23 THE COURT: Understood.

24 Just for context, I understand that the argument or
25 your contention is that the complaint, to the extent it pleads

M988KOOOC

1 satisfaction of the loan, is referring to satisfaction of the
2 principal amount of maybe interest due on the loan. Can you
3 just tell me the nature of the other obligations that you
4 assert to be pleaded as having not been satisfied?

5 MS. WILL: Yes. The foreclosure sale would effect the
6 principal amount owed under the mezzanine loan, but not the
7 mortgage loan. The mortgage loan had the principal amount of
8 \$330 million, and with the addition of interest and other costs
9 and expenses related to the mortgage loan, that has increased
10 in value, which I believe has been submitted to this Court in
11 our pretrial filings for the pretrial conference that is to be
12 held next week.

13 The other obligations that are alleged in the
14 complaint deal with the costs and expenses related to enforcing
15 lender's rights under the mezzanine loan, as well as it relates
16 to the mortgage lender and the mortgage borrower under the
17 mortgage loan. Those costs and expenses can include attorneys'
18 fees and, as referenced in the complaint, there has been
19 numerous litigations, motions, things that lender has had to
20 pursue because of Ashkenazy's interference. This goes from the
21 answer filed in the condemnation proceeding, the motion to
22 strike filed in the condemnation proceeding, the declaratory
23 judgment that lender had to bring before this Court regarding
24 the foreclosure sale and the validity thereof. All of those
25 costs are reflected by lender's exercise of rights under the

M988KOOOC

1 mortgage and mezzanine loan documents, which is what Ashkenazy
2 is liable for based on the guaranty.

3 THE COURT: Thank you. That is based on the
4 borrower's recourse liabilities definition, is that right, in
5 the loan agreement?

6 MS. WILL: Correct, your Honor.

7 THE COURT: Can you point me to the specific subclause
8 or subclauses that are the basis for that contention?

9 MS. WILL: Yes, your Honor.

10 In 11.22 of the mezzanine loan agreement and the
11 mortgage loan agreement is where the exculpation clause is.
12 And that identifies the borrower's recourse liabilities, which
13 goes through the intentional material misrepresentations under
14 clause 1, the willfulness conduct under clause 2, and the other
15 legal proceedings relating to the debt that were filed by
16 borrower, mortgage borrower, or guarantor under clause 14. And
17 under those triggering events, the guarantor would be liable
18 for any actual loss, actual damage, cost, expense, actual
19 liability, claim, or other actual obligation incurred by
20 lender. And those definitions of borrower's recourse
21 liabilities is brought into the guaranty language.

22 THE COURT: Thank you. Understood.

23 Please proceed.

24 MS. WILL: Thank you.

25 Under the loss recourse liability specifically, the

M988KOOOC

1 last section that defendant addressed, lender would argue that
2 we have not alleged fraud in this case. We have alleged the
3 material misrepresentations, which is a separate clause in the
4 recourse liabilities. So we do not need to satisfy the higher
5 pleading standard in this case. The "or" in that provision is
6 disjunctive, which present two different choices, which
7 identifies intent by the parties that they should be treated
8 differently and that there doesn't need to be a higher pleading
9 standard met in this case.

10 The argument that statements made in judicial
11 proceedings are privileged is true against tort claims, but
12 here lender is merely trying to enforce a breach of contract
13 claim, and so that privilege does not apply.

14 Then, with the argument that the complaint does not
15 allege willful misconduct or gross negligence adequately, we
16 would argue that there has been numerous allegations contained
17 within the complaint that identify Mr. Ashkenazy's
18 interference, misrepresentations, directions to third parties
19 to ignore lender, withhold information from lender, and
20 continue to act as if the foreclosure sale did not happen.
21 Those actions are willful misconduct, if not gross negligence,
22 at the very least.

23 Then, lastly, the argument that the answer and motion
24 to strike does not fall within the other legal proceedings
25 language in clause 14. We think that that language is broad

M988KOOOC

1 enough to include the filings that were done in the
2 condemnation action to justify recourse under the obstruction
3 provision.

4 THE COURT: Thank you very much.

5 I am going to turn to counsel for Mr. Ashkenazy.
6 Again, this is not oral argument, but if there is anything that
7 you would like to offer in response to the contentions just
8 forwarded by plaintiff's counsel, I would like to give you the
9 opportunity to do that now.

10 Counsel, is there anything?

11 MR. ROSS: Yes, your Honor.

12 First of all, I just want to double back. The
13 paragraphs that your Honor asked me about, which involved
14 statements specifically made in litigation filings, are at the
15 following paragraphs of the complaint: 41, 49, 52, 58, and 73.

16 I won't try to address all of the arguments that
17 counsel just went through because they are already addressed in
18 one way or another in our filing with your Honor at document 13
19 in some detail. But, basically, the custodian provision that
20 we discussed, and that your Honor asked Ms. Will questions
21 about, I think demonstrates the very point that the context and
22 nature of the provisions that are the subject of the springing
23 guaranty in paragraph 4 thereof are addressed to a
24 creditor-debtor context and not to a property manager who is
25 under contract to provide office services to Union Station. I

M988KOOOC

1 just think that is obviously not the context in which this
2 springing guaranty was intended to come into effect.

3 Second, counsel talked about and I think inadvertently
4 confused the issues under the mezzanine loan with the mortgage
5 loan. They are not one and the same. The allegations of
6 wrongdoing are all in the context of the mezzanine loan. And
7 if the mezzanine loan was extinguished, then those allegations
8 have no bearing on the mortgage loan, where there has been no
9 effort to enforce the mortgage loan.

10 With respect to the concept that obligations remained
11 outstanding under the mezzanine loan after the foreclosure was
12 allegedly effected and the note satisfied, generally speaking,
13 one can't get more than the satisfaction of the outstanding
14 obligation. If there had been an outstanding obligation, it
15 wasn't set forth in the context of the foreclosure. And it was
16 said that the note was fully satisfied. You can only get one
17 satisfaction. So the idea now that legal fees or costs or
18 expenses can still be recovered we think is inconsistent with
19 the record.

20 The idea that plaintiff would like to change its
21 pleading to say that it's disputed that the foreclosure was
22 effective is surprising, given all the filings that they have
23 made with the Court in the related proceeding, and I think
24 contrary to their position. So, again, we are relying on
25 exactly the claim that was pled, and I think a standard

M988KOOOC

1 12(b)(6) motion assumes the truth of the facts as pled, well
2 pled facts.

3 I have specific points that I could -- well, your
4 Honor, I think that principally covers it.

5 THE COURT: Thank you very much.

6 Just a couple of brief notes. One, I have made this
7 observation as an aside in the related case. I will raise it
8 again as an aside now, perhaps with an issue that the parties
9 have views about but that haven't been flushed out yet.
10 Namely, what is the effect on the nature of the outstanding
11 obligations under the loan agreement following as part of a
12 foreclosure sale that plaintiff alleges here satisfied the
13 principal amount of the outstanding obligations? The parties
14 are commenting about what the effect of that sale is in the
15 credit bid in terms of the continuing effect, I will call it,
16 of the underlying loan agreement. But at this point I haven't
17 yet seen much law on that question. I raise this briefly in
18 the context of the, I will call it, tail effect of the
19 covenants in the loan agreement, but it may be pertinent here
20 with respect to the question about continuing obligations that
21 may be owing by the guarantor. In any event, that's just as an
22 aside.

23 As a second aside, counsel, we are going to have a
24 conference next week. That's an initial pretrial conference
25 with respect to the case. As I understand it, at that point I

M988KOOOC

1 will be confronted by a threshold issue regarding whether or
2 not to stay the discovery in the case pending briefing and
3 resolution of that motion. I am going to defer a determination
4 on that question until that conference. But I appreciate very
5 much your arguments here will inform my assessment of any
6 application to effectively stay discovery here, which I
7 understand to be the request, as embedded in the proposed case
8 management plan.

9 The other third aside, with apologies, is a note about
10 the upcoming initial pretrial conference. Just an issue that I
11 hope to discuss, at least in part, at this upcoming conference,
12 which is I just want to make sure that we have on the table the
13 possibility of discussing whether there is an advice of counsel
14 defense that the defendant is going to put forth here with
15 respect to the contentions that he acted in bad faith. I don't
16 know to what extent that is an issue here, but it's an issue
17 that I think we should have in front of us, given potential
18 privilege issues and the like, as we frame our discovery
19 protocol going forward. Again, that's not an issue for today,
20 but an issue I just wanted to note because it will require a
21 little bit of advance thought, but I think it's implied by the
22 bad faith contention based on clause 14 of 11.22 in the loan
23 agreement.

24 For now, let me limit myself to setting a schedule for
25 briefing of the motion. Again, I will take up the application

M988KOOO

1 to stay during our proceeding next week.

2 Counsel for defendant, when would you propose to file
3 your motion?

4 MR. ROSS: Your Honor, by September 22, two weeks from
5 today.

6 THE COURT: That's fine. Thank you.

7 So, I am going to set the following schedule, and I am
8 going to set what I am going to describe as the default
9 schedule. The parties know the rule provides plaintiff the
10 opportunity to amend the complaint within 21 days after the
11 filing of a motion. For that reason, I am going to set the
12 opposition date as three weeks or 21 days following the service
13 of the motion.

14 So the motion itself is due no later than September
15 22. Any opposition is due no later than three weeks following
16 the date of service of the motion. Any reply is due no later
17 than one week following the date of service of any opposition.
18 I will enter an order establishing that schedule shortly after
19 today's conference, and I look forward to talking with you next
20 week and discussing, among other things, the application to
21 stay discovery pending briefing and resolution of the motion.
22 There, as you should expect, I expect to evaluate whether or
23 not there is good cause for a stay under governing legal
24 principles. So I look forward to hearing your arguments on
25 that topic. Again, thank you for your arguments here. It will

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1 be informative as I consider that application.

2 Anything else that we should take up here?

3 Let me begin with counsel for defendant.

4 MR. ROSS: No, your Honor. Thank you very much.

5 THE COURT: Counsel for plaintiff.

6 MS. WILL: No, your Honor. Thank you.

7 THE COURT: Thank you very much. This proceeding is
8 adjourned.

9 (Adjourned)